Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2021

Holly Boyer
ESNER, CHANG & BOYER

Shea Murphy
ESNER, CHANG & BOYER

When it comes to evidentiary issues on appeal, hindsight can't be 20/20

A LOOK AT FOUR COMMON SCENARIOS THAT CAN MAKE A DIFFERENCE IN WHETHER YOUR APPEAL GOES FORWARD

A successful appeal begins at trial. While it may not be possible to engage appellate counsel to assist with error preservation during trial, it is imperative to be aware of the potential for an appeal and ensure that you are at all times protecting your record. The following scenarios are designed to help sharpen your appellate-minded skills.

Making a record; transcripts are crucial

Throughout trial, the defense repeatedly portrays the plaintiff as engaging in a criminal enterprise in a products-liability action where the owner of a small business brought claims for negligent failure to warn concerning a defective cannister that exploded and injured him.

On the last day of trial, immediately before closing arguments, all counsel meet in the court's chambers to discuss the plan for the day. The court reporter is not present. You raise the issue that you believe the defense will attempt to discuss alleged criminal practices by the business that the court previously ruled is inadmissible in a motion in limine. The court discusses the issue and reminds defense counsel that the subject of criminality is off limits.

During closing statements, the defense includes a slide in his power point of Al Pacino portraying Don Corleone in the Godfather, with counsel stating, "don't ask me about my business." You immediately object. The court sustains the objection and calls a sidebar (without a reporter present) and admonishes defense counsel. You ask for a mistrial, explaining that the repeated misconduct of counsel has infected the jury. The court denies your request. The jury returns a verdict in favor of defense. Have you done everything necessary to make a record on appeal?

Nope. As noted by one appellate court: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, *if it is not in the record, it did not happen*; and third, when in doubt, refer back to rules one and two."

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2021

(*Protect Our Water v. Cty. of Merced* (2003) 110 Cal.App.4th 362, 364.)

The first problem here is the absence of a court reporter for the discussion in chambers and during sidebar. Without a reporter's transcript or a statement on the record concerning the admonition before closing and the request for mistrial, it may be difficult, if not impossible, to argue on appeal that the trial court abused its discretion in denying such relief in light of the misconduct of counsel.

While it may be possible to present an agreed statement or settled statement on appeal as to what occurred off the record (see California Rules of Court, rules 8.134 and 8.137), it is best to avoid this predicament all together by requesting that all interactions with the court be recorded. To the extent that may not be possible, counsel should immediately memorialize any unreported rulings when back on the record. Given the dynamic nature of trial, consider keeping a log of any rulings or discussions held off the record and at the conclusion of each day of trial, and outside the presence of the jury, detail such rulings before the court with the reporter present. In those situations where that may also prove unavailable, consider preparing a proposed order or declaration detailing what occurred and filing with the court so that there is at least a written record describing the events.

The need for a record is particularly necessary when dealing with evidentiary issues and attorney misconduct, as objections and admonitions not made are generally waived. "A party ordinarily cannot complain on appeal of attorney misconduct at trial unless the party timely objected to the misconduct and requested that the jury be admonished. [Citation.] The purpose of these requirements is to allow the trial court an opportunity to remedy the misconduct and avoid the necessity of a retrial; a timely objection may prevent further misconduct, and an admonition to the jury to disregard the offending matter may eliminate the potential prejudice." (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411-1412.) Given that the presumption on appeal is that the trial court ruled correctly, counsel will want to make sure those critical objections and discussions held off the record make it a part of the record preserving the issue for any potential appeal.

The second hurdle presented in this scenario is ensuring that the picture itself makes it into the record. While the trial court was obviously aware of the picture and the reporter captured the defense counsel's statement concerning "don't ask me about my business," the picture itself has not been made a part of the trial court's record. Since the prejudicial nature of the issue may depend on the appellate court actually seeing the picture shown to the jury, consider requesting that defense counsel's slides be submitted or lodged with the court after closing statements to ensure that any visual presentations are included in the court's record. Another thought is if you move for new trial, make sure to include the objected-to photo or slide as an exhibit to the new-trial motion. However possible, the goal is to ensure that whatever is seen by the jury is a part of the trial court's record.

Note, that this same caveat rings true for video depositions played at trial. To ensure that the video depositions become a part of the record on appeal, make sure to either lodge a written transcript of the portions played to the jury with the trial court, or lodge the video itself with the specific portions identified that were played to the jury, or simply have the reporter transcribe the video testimony as a part of the reported proceedings.

The offer of proof

In a premises-liability action involving the foreseeable risk of third-party criminal activity, the trial court grants the defendant's motion in limine seeking to exclude your safety expert as a discovery abuse sanction for your alleged failure to timely designate the expert. The motion in limine did not attach the expert's deposition, but instead, focused almost entirely on the discovery issue. The trial court noted at the hearing that the court suspects the testimony to be entirely speculative on the issue of causation and whether additional safety measures would have made a difference in preventing the assault. Following the jury's verdict in favor of the defense, finding negligence but no causation, you appeal. You are confident that there was no discovery abuse and you have made an adequate record demonstrating such. Slam dunk on appeal?

Not quite. While the arguments concerning the discovery sanction may be strong, reversal is appropriate only where the exclusion of the expert resulted in a miscarriage of justice. On appeal, you will need to point to what the expert would have testified to and the likely effect of such testimony on the verdict. To do this, you will need to have made an offer of proof before the trial court. An "offer of proof" is a showing made out of the jury's presence establishing the substance, purpose and relevance of proffered evidence. (*In re Mark C.* (1992) 7 Cal.App.4th 433, 444-445.) A party's failure to make an "offer of proof" waives the right to a new trial or appeal based on the erroneous exclusion of evidence: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless … [t]he substance, purpose and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means …" (Evid. Code, § 354, subd. (a).)

A record here would need to include the substance, purpose and relevance of the expert testimony that was excluded. Once it became clear that the court was excluding the expert testimony as a discovery sanction, counsel could have made an oral or written offer of proof concerning the excluded testimony. Perhaps counsel could have filed a written description of the testimony and attached a copy of the deposition. Conclusory statements, such as "the witness will testify

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2021

as to causation," are likely insufficient to warrant a finding of prejudice on appeal. Be specific in the offer of proof. Further, consider requesting an Evidence Code section 402 hearing if appropriate.

If you know there is an issue concerning the exclusion of certain evidence that will be argued during motions in limine or may come up during trial, be prepared with a pocket brief detailing a written offer of proof and including any relevant documents, exhibits or testimony. Recognizing the fluidity of trial, and that sometimes critical evidence is excluded during the examination of witnesses rather than in a motion in limine before trial, consider doing a recap at the end of each day to decide if an offer of proof is necessary concerning the adverse rulings.

Not only will a detailed offer of proof protect your client on appeal, but it may also convince the trial court to reconsider its ruling.

New facts on appeal

In a sexual-abuse action against a school district, your complaint is dismissed after the court finds that you have failed to demonstrate the requisite notice sufficient to support your claim for negligent supervision of the students. The order of dismissal is entered and you file a notice of appeal. While your claim is pending on appeal, you discover a prior victim of sexual abuse by the same perpetrator. You also find out that this victim reported the abuse to the school district years prior to the sexual abuse of plaintiff. Such evidence would undoubtedly demonstrate notice sufficient to support your negligence claims. Can you discuss it on appeal?

Yes. While the general rule is that documents and facts that were not presented to the trial court and therefore not a part of the record on appeal generally *cannot* be considered by the Court of Appeal, where the appeal concerns an order sustaining a demurrer without leave to amend, new facts may be raised for the first time on appeal. (Code Civ. Proc., § 472c; *Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460-464.) The appellate court reviews the decision to deny leave to amend to determine "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion" in denying leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) As a part of the court's review, leave to amend may be requested for the first time on appeal. (See Code Civ. Proc. § 472c, subd. (a); *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 411-412; *Galligan v. City of San Bruno* (1982) 132 Cal.App.3d 869, 876.) A request to amend at the trial court level is not an essential prerequisite to appellate relief from the demurrer dismissal. The requisite showing can be made for the first time on appeal. (Code Civ. Proc., § 472c(a).)

Another thought to keep in mind is that while new facts may not be raised on appeal absent specific situations such as the above, the Court of Appeal may take judicial notice of matters that were not before the trial court. (Evid. Code, §§ 452, 459; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125.) So, for example, if the law has changed concerning the notice required to establish a claim against a school district, the post-judgment change may be judicially noticed, especially where the change has mooted the issue on appeal. (See *Old National Fin'l Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 467.) The post-judgment legislative change may be brought to the appellate court's attention by motion for judicial notice. (*Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 244.)

In this same vein, assume that under the scenario above, the prior victim of sexual abuse by the same perpetrator is successful in a jury trial against the school district. The jury explicitly finds that the school district had the requisite notice that the perpetrator posed a threat of sexual abuse. The jury's verdict and the following judgment all occur while your case is pending on appeal.

Under this scenario, despite the fact that the judgment occurred after your judgment, and therefore was not before the trial court when it ruled in your case, judicial notice by the Court of Appeal may be appropriate for res judicata or collateral estoppel purposes. Where two separate lawsuits on the same cause of action are simultaneously pursued, and judgment in one lawsuit becomes final during the pendency of an appeal in the other lawsuit, the final judgment is res judicata and bars further litigation in the second lawsuit, and may be brought to the appellate court's attention in the first instance for the purpose of effecting res judicata. (*Palm Springs Paint Co. v. Arenas* (1966) 242 Cal.App.2d 682, 688.)

Failure to object to an incorrect jury instruction

In an employment-discrimination action, both sides request jury instructions, including instructions governing the plaintiff's claim for violation of the Bane Act (Civil Code § 52.1). You propose your own instruction guided by the statutory language itself, while the defense proposes a pattern instruction. The pattern instruction requires that the plaintiff prove that the defendant act with discriminatory animus or intent. While you did not include this element in your instruction, you fail to notice it in the defense's pattern instruction and thus do not specifically object to the instruction proposed by the employer. The trial court elects to instruct the jury in accordance with the pattern instruction. After the jury finds against Plaintiff on all claims, you appeal, arguing instructional error. The defense contends that you waived any error. Are they right?

No. A party need not have objected to a jury instruction that is an incorrect statement of the law in order to challenge the erroneous instruction on appeal. (Code Civ. Proc., § 647.) Even pattern jury instructions are not entitled to a presumption of correctness. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286.) In these circumstances, the failure to object

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2021

does not invoke the invited error doctrine. (*Huffman v. Interstate Brands Cos.* (2004) 121 Cal.App.4th 679, 706 [invited error doctrine "requires affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party"].) Thus, even if trial counsel does not articulate an error in an instruction, counsel is nonetheless *deemed* to have objected to instructions proposed by the other side and thus preserved claims of error for appeal. (See Code Civ. Proc., § 647.) While this may be one of the few situations where an objection is not necessary, there are several exceptions to this rule making it dangerous to rely on any deemed objection on appeal.

Notably, the automatic objection covers only instructions that misstate the law. (*Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, 7.) Thus, the objection does not apply to instructions that are correct on their own but are incomplete given the state of the evidence. To preserve that contention on appeal, a party must object and offer a qualifying instruction.

Further, a litigant may not seek reversal on appeal based on improper jury instructions that *he or she requested*, or in which he or she *acquiesced*. (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal. App.4th 984, 999-1007.) Further, the statutory objection does not preserve an objection to a jury instruction similar to an instruction requested by the aggravated party. The invited-error doctrine applies "with particular force in the area of jury instructions. Whereas in criminal cases a court has strong *sua sponte* duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities. A civil litigant must propose complete instructions in accordance with his or her theory of the litigation and a trial court is not 'obligated to seek out theories [a party] might have advanced, or to articulate for him that which he has left unspoken.' [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal. App.4th 1645, 1653.) Thus, a party cannot complain on appeal of substantive errors in instructions which the party requested the court give.

Given the favorable standard of review in instructional error cases, where the appellate court views the evidence in the light most favorable to the claim of instructional error, it is best to err on the side of caution and object to any instruction that seems inaccurate, and if appropriate, a request for an alternative instruction.

Sharpening your appellate skills is always a good idea and will no doubt place you in the right posture for success should your case go up on appeal.

Holly Boyer, named 2019 "Appellate Lawyer of the Year" by CAALA, is a partner in Esner, Chang & Boyer, *a boutique appellate firm with offices in Southern and Northern California. All of the partners are certified by the State Bar of California as appellate specialists. In addition to handling all aspects of appellate litigation, the firm also assists trial lawyers with dispositive and post-judgment motions.*

Shea Murphy is a partner at Esner, Chang & Boyer, *a boutique appellate firm with offices in Southern and Northern California. In addition to handling all aspects of appellate litigation, the firm also assists trial lawyers with dispositive and post-judgment motions.*